No. 88-1337
No. 88-1351

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HERMAN SOIFER,

Petitioner,

—v.—

BANKERS TRUST COMPANY, *et al.*,

Respondents.

DANIEL RHOADES and MILTON BRATEN,

Petitioners,

—v.—

BANKERS TRUST COMPANY, *et ano.*,

Respondents.

BRIEF OF RESPONDENT BANKERS TRUST COMPANY IN OPPOSITION TO PETITIONS OF HERMAN SOIFER, DANIEL RHOADES AND MILTON BRATEN FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Did the Court of Appeals err, so as to require review by this Court, in holding that Respondent-plaintiff had standing to assert a civil claim under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* ("RICO"), where Respondent was injured in its business and property by the conduct constituting the violation, including repeated acts of bankruptcy fraud preventing plaintiff from recovering its debt from a bankrupt corporation and depriving plaintiff of its bankruptcy law remedies and bribery of a state court judge in state court proceedings involving the plaintiff?

2. Did the Court of Appeals err, so as to require review by this Court, in holding that a bankrupt corporation, forming part of a RICO enterprise and which is under the continuing control of the individual RICO defendants, is not the only party with standing to bring a RICO claim against the defendants, where the RICO pattern includes—but does not consist solely of—the looting of the corporation's assets by those defendants, and where no other creditor of the corporation has sought any relief based upon those offenses, no trustee in bankruptcy for the corporation has been appointed, and any trustee that could be appointed might not have a claim and also might be barred from obtaining relief by the statute of limitations?

3. Did the Court of Appeals err, so as to require review by this Court, in applying the rule of separate accrual to govern the period of limitations applicable to RICO claims, and holding that the period does not begin to run until the damages recoverable, if any, are determined by resolution of bankruptcy proceedings that bear on such injury, and in directing the dismissal without prejudice of a creditor's RICO action on the ground that the claim had not yet accrued?

PARTIES TO THE PROCEEDINGS

Respondent Bankers Trust Company is the plaintiff in this lawsuit and was the appellant in the Court below. Petitioners Herman Soifer, Daniel Rhoades and Milton Braten are the defendants in this lawsuit and were the appellees in the Court below.

Bankers Trust Company is a subsidiary of Bankers Trust New York Corporation. The following is a list of Bankers Trust Company's affiliates and subsidiaries:

Subsidiaries of Bankers Trust New York Corporation

Bankers Trust Company
Bankers Trust Company of California, N.A.
Bankers Trust Company of Florida, N.A.
Bankers Trust (Delaware)
  BTC Corporation
BT Advisors, Inc.
BT Brokerage Corporation
BT Investment Managers, Inc.
  Sumigin Bankers Investment Management Co. Ltd.
BT Leasing Corp.
BT Leasing Services, Inc.
  BT Commercial Corporation
Coleman Factors Corporation
BT (Pacific) Ltd.
  BIC Trade
    Iochpe Trade S.A. Comercio Internacional
  BIC Brazil
    Sernic S.A. Comercio e Servicos
    Banco Iochpe S.A.
    Banco Iochpe de Inveštimento S.A.
      Iochpe Arrandamento Mercantil S.A.
      Iochpe S.A. Corretora de Valores Mobiliarios
      Iochpe S.A. Credito Financiamento e Investimento
      Iochpe S.A. Distribuidora de Valores Mobiliarios
      Figorifico Ideal
  BT Holdings (South America) Ltd.

BT Holdings (South America) Ltd y Compania Ltda.
IM Trust
Brett Investments Ltd.
Brett (Chile) S.A.
BT (Pacific) Ltd. y Compania Ltda.
Compania de Seguros de Vida Consorcio Nacional de Seguros S.A.
Administradora de Fondos de Pensiones Provida S.A.
Inversiones Santiago
Sahathunpaibul Co., Ltd.
BT Southwest, Inc.
BT Southwest Trust Company
BT Capital Corporation
ADS Associates, Inc.
BT Futures Corp.
BT Futures (Singapore) Ltd.
BT Holdings (Asia) Ltd.
BT Brokerage (Asia) Limited
BT Brokerage (H.K.) Limited
BT Futures (H.K.) Limited
BT Equities (H.K.) Limited
BT Brokerage Nominees Limited
BT Investments (New Zealand) Ltd.
BT New Zealand (Holdings) Ltd.
BT New Zealand Ltd.
Bankers Trust Pacific Ltd.
BT Financial Corporation (NZ) Ltd.
BT New Zealand (HK) Ltd.
Valuta Investments Ltd.
BT Brokerage and Associates Ltd.
Ruamthunpaibul Co., Ltd.
PT Bankers Trust Lippo Leasing
BT Overseas Finance (Delaware), Inc.
Bankers Trust Overseas Finance N.V.
Bankers Trust International Capital N.V.
BT International Trading Corporation
BT Private Clients Corp.
BT Securities Corporation
Lourmel Investors (Delaware), Inc.

Private Clients Group, Inc.
BT Partners, Inc.
BT Realty Resources, Inc. (formerly Sackman-Gilliland Corporation)
Dedham Property Associates, Inc.
Investors Real Estate Corp.
Marlboro Hotel Corp.
Peabody Hotel Corp.
BT Gold (sold in 1988)
BT Financial Services Information Systems Corporation
Pyramid Ventures Inc.
BT Financial of California, Inc.
BT Northeast
RAM International
Equator Holdings Inc.
World Trading Inc. (Delaware)
World Trading Inc. (Cayman Islands)
Capricorn Holdings Inc.
Capricorn Holdings Limitado
Solciedad Quimica y Minera de Chile S.A.

Subsidiaries of Bankers Trust Company

BT Aeron, Inc.
BT Baltimore, Inc.
BT Bancshares, Inc.
Bankers Trust Company of Albany, N.A.
BT Barges, Inc.
BT Philmor, Inc.
BT Ventures, Inc.
BT Green, Inc.
BT Ever, Inc.
BT Harborside Urban Renewal Corporation
Kingsmead New York Investors, Inc. (*sold in 1988*)
200 Greenwich Investors, Inc. (*sold in 1988*)
B.T.N.Y. Services, Inc.
BT Straits, Inc.
Bankers Company, Inc.
Bankers Trust Nominees, Ltd.
Japan Bankers Trust Company, Ltd.

Bankers Trust International
BT Bank of Canada
BT Potomac, Inc.
BT Pyramid Corp.
  BT Cargo, Inc. (*sold in 1988*)
  BT Despatch, Inc. (*sold in 1988*)
  BT Equipment Leasing, Inc.
    Realprop Investors Pacific, Inc.
  BT Expedition, Inc.
Grobar & Company
625 Investors, Inc.
BT Parcel, Inc.
BT Florida, Inc.
Pyramide Nominee Limited
  Bankers Trust Nominees Limited
BT Sing, Inc.
BT Siang-Tse, Inc.
Trybaco Holding Corp.
Bankers Company of New York
  Bankers Trustee Company, Ltd.
    Credit and International Trust N.V.
Sablons Investors, Inc.
Pep II Investors, Inc.
Bankers Trust Luxembourg
Bankers International Corporation
  Private Export Funding Corp.
  Petroquimica del Atlantico S.A.
  Bankers Trust Finanziaria S.p.A.*
  B.T. Rio de la Plata, S.A.
  B.T. International (Nigeria) Ltd.
  B.T. Overseas Representatives, Inc.
  Bankers Trust (Brasil) Services Ltd.*
  BT Virgin Islands, Inc.
  Bankers Trust Holdings (Europe) Ltd.
    BT Pension Fund Trustees Ltd.
    Bankers Trust Holdings (UK) Ltd.

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* Subsidiaries are listed with parent holding the largest interest in the entity.

Pyramid Holdings PLC
The World Markets Company PLC
Pyramid Office Properties Ltd.
Pyramid (UK) Ltd.
BT GoldNotes Limited
Bankers Trust International Ltd.
BT Gilts Ltd.
BT Gilts Nominees Ltd.
BT Sterling Securities Ltd.
SNC Bankers Trust Holdings (Europe)*
BT Finance et Marches S.A.
Bankers Trust (France) S.A.
BTI Investments Ltd.
BT Servicios Financieros S.A.
Lognee Holdings Ltd.
Ezando Ltd.
New Broad Street Properties Ltd.
Shipton Automation Ltd.
Rodo Nominees
Bankers Trustee Company Ltd.
Rodocanachi Leasing Ltd.
Turk Merchant Bank A.S.
B.T. International (Delaware), Inc.
B.T. International (Nigeria) Ltd.
BT Asia (Hong Kong) Limited
BT Foreign Investment Corp.
Bankers Trust International Services Ltd.
Bankers Trust Management Co., Ltd.
BT Asia (Securities) Limited
BT Nominees (H.K.) Ltd.
BT Asia Securities (H.KI.)
BT Asia Securities (Tokyo)
BT Finance Ltd.
Bankers Trust AG
B.T. (Cayman) International Ltd.
BTSA Panama
B.T. Asia Limited

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* Subsidiaries are listed with-parent holding the largest interest in the entity.

BT Nominees (H.K.) Ltd.
BT Finance Ltd.
Bankers Trust Gmbh
Deutsche Union Finanzberatungs Gmbh
BT Trustees (Jersey) Ltd.
Globnet
BT Investments (Australia) Limited
Bankers Trust Australia Limited
BT Australia (H.K.) Financial Services Ltd.
BT Australia Limited
BT Australia (H.K.) Limited
BT Australia (U.K.) Limited
BT Finance International Limited
BT Pacific Management Limited
Grenville Finance Limited
Abton Pty. Limited
Bavian Pty. Limited
Bittoorong Pty. Limited
Bond Investments (Singapore) P/L
BT Asset Management Limited
BT Consultants Pty. Limited
BT Custodians Limited
BT Finance Pty. Limited
BT Financial Services Limited
BT Lease Packaging Pty. Limited
BT Leasing (No. 1) Pty. Limited
BT Nominees Pty. Limited
BT Securities Limited
Share Australia Management Company Ltd.
BT Structured Finance Pty. Limited
Quexton Pty. Limited
BT (Queensland) Pty. Limited
Cazinon Pty. Limited
Cebary Pty. Limited
Cedant Pty. Limited
Cederno Pty. Limited
Cedfield Pty. Limited
Cefford Pty. Limited
Cefington Pty. Limited

Cemasta Pty. Limited
Cenford Pty. Limited
Colebrook Securities Pty. Limited
Deccand Pty. Limited
Deline Pty. Limited
Lysona Pty. Limited
Orelino Pty. Limited
Pendal Nominees Pty. Limited
Rugarno Pty. Limited
Sabt Investments (Singapore) Pty. Limited
Sanlucar Pty. Limited
Tadina Pty. Limited
Talamba Pty. Limited
Tegny Pty. Limited
Tenata Pty. Limited
Vanne Pty. Limited
Abadee Pty. Limited
Altamira Pty. Limited
Austraclear Limited
BT Finance & Investment Pty. Limited
BT Leasing (No. 2) Pty. Limited
BT Leasing (No. 3) Pty. Limited
BT Stockbrocking Pty. Limited
Button Wood Nominees Pty. Limited
Citic Nominees Pty. Limited
Clopa Pty. Limited
Dintene Pty. Limited
Girlindee Pty. Limited
Hevenly Pty. Limited
Lasid Pty. Limited
Mason Street Holdings (No. 2) P/L
Micabank Pty. Limited
Mimlor Pty. Limited
Nabaro Pty. Limited
Nanway Nominees Pty. Limited
Neray Limited
Partin Pty. Limited
Portland Investments A Pty. Limited
Portland Investments B Pty. Limited

Portland Investments C Pty. Limited
Potona Pty. Limited
Respus Pty. Limited
Rovenda Pty. Limited
Rovny Pty. Limited
Roydar Pty. Limited
Rulan Pty. Limited
Runala Pty. Limited
Sabt Pty. Limited
Sadoy Pty. Limited
Sodaine Pty. Limited
Technology Investment Management Fund
Varzy Pty. Limited
Wuxta Pty. Limited
Zatika Pty. Limited

Bankers Trust International (Asia) Ltd.
Thai Investment & Securities Co. Ltd.
Malta Properties Ltd.
Anscor Capital & Investment Corp.
Tun Thamrong Company Ltd.
National Investment Trust Company Ltd.

Other Real Estate Subsidiaries of Bankers Trust Company

Anvers Investors, Inc.
Bercy Investors, Inc.
Duroc Investors, Inc.
Ero Properties, Inc.
Ero Properties Pacific, Inc.
Great Lakes Realty Corp.
Jasmin Investors, Inc.
Lessprop Investors, Inc.
Louremel Investors, Inc.
Melba Investors Atlantic, Inc.
Melba Investors Southeast, Inc.
Pelleport Investors, Inc.
Protean Investors, Inc.
Reo Resources, Inc.
Reo Resources Atlantic, Inc.
Sablons Investors, Inc.

Sarel Investors Atlantic, Inc.
Sarel Investors Pacific, Inc.
Sarel Investors Florida, Inc.
Pyramid Energy, Inc. (formerly Scandrill, Inc.)
Varrene Investors, Inc.
Vikell Investors, Inc.
Vikell Investors Pacific, Inc.
Wagram Investors, Inc.

Investments Controlled as a Result of Debts Previously Contracted

General Exploration Company
South Texas Drilling & Exploration

Investment Controlled as a Result of a Fiduciary Relationship

Infinity Broadcasting
Medical Care International

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BRIEF OF RESPONDENT BANKERS TRUST COMPANY IN OPPOSITION TO PETITIONS OF HERMAN SOIFER, DANIEL RHOADES AND MILTON BRATEN FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent Bankers Trust Company ("Bankers") respectfully prays that the separate petitions, of Herman Soifer, and of Daniel Rhoades and Milton Braten,[1] for a Writ of Certiorari to

1 The Petition of Rhoades and Braten simply adopts by reference the arguments made in the Petition of Soifer.

issue to the United States Court of Appeals for the Second Circuit, be denied.

COUNTER-STATEMENT OF THE CASE[2]

Because Petitioners do not set forth the full nature and substance of Bankers' claims herein, Barkers respectfully submits this Counter-Statement of the Case, so that the issues can be seen in their proper context.

1. The Bankruptcy Frauds—1974-1977

Petitioners own, direct and control Braten Apparel Corporation ("BAC"). *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1098 (2d Cir. 1988); App. 3a. As of August 1974, BAC owed Bankers more than $4 million. In that month, at a time when BAC had recently sustained severe financial losses, it acquired all the stock of Brookfield Clothes, Inc. ("Brookfield Clothes"), which then had a net value of more than $3 million. In order to eliminate the indebtedness owed to Bankers and at the same time retain control over the assets of BAC (including, particularly, Brookfield Clothes), Petitioners Braten and Soifer (later joined by Petitioner Rhoades) embarked upon a scheme to conceal assets and obtain a fraudulent discharge in bankruptcy.

Braten and Soifer secretly agreed that Soifer would assume the apparent ownership of Brookfield Clothes and that BAC would file and prosecute a petition under Chapter XI of the Bankruptcy Act. It was agreed that Soifer would return Brookfield Clothes to BAC once BAC's bankruptcy discharge was obtained.

To effectuate this scheme, a sham "agreement" was executed among BAC, Braten and Soifer, which made it appear that

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2 References hereinafter to "App. _____" are to pages in Petitioners' joint Appendix.

BAC had lost its ownership of Brookfield Clothes to Soifer because it failed to make a certain loan. Misrepresentations respecting the ownership of Brookfield Clothes were made throughout BAC's Chapter XI proceeding, including, *inter alia*, the filing by BAC and its officers of a fraudulent Chapter XI petition (sworn to by Braten), Braten's false testimony in Bankruptcy Court, false financial statements of BAC distributed to BAC's creditors, false pleadings prepared by Petitioner Rhoades (counsel to BAC and to Braten) verified by him and by Braten, an "amendment" to BAC's Chapter XI schedules filed on the eve of the confirmation of BAC's proposed arrangement, and Rhoades' false testimony in Bankruptcy Court, as well as false out-of-court statements made to Bankers and other BAC creditors by the attorney for Soifer and Braten.

By these misrepresentations, Bankers was induced to accept a Chapter XI plan of arrangement proposed by BAC; in March 1976, BAC obtained the Bankruptcy Court's confirmation of the arrangement, which had the effect of relieving it of more than $4.3 million in debt.

A few months thereafter, the second phase of Petitioner's scheme was effected, by a complicated sequence of stock and asset transfers. Soifer gave Brookfield Clothes back to BAC, and publicly acknowledged that BAC had owned it all along (even during the period BAC was in Chapter XI). Soifer acquired from Braten half of the stock of Brookfield Industries, Inc. ("Brookfield Industries"), to which a substantial portion of the assets of Brookfield Clothes was conveyed. Soifer also purchased 45% of the stock of BAC from Braten; and Soifer's note, which he had given to Braten, was assigned by Braten to Rhoades.

Shortly after Soifer publicly acknowledged BAC's ownership of Brookfield Clothes, Bankers commenced a proceeding to revoke the confirmation of BAC's arrangement on the grounds that it had been procured by fraud. That proceeding resulted in revocation of the 1976 confirmation order, by decision and

order, after trial, of the Bankruptcy Court issued June 25, 1982.[3]

2. The Bribery

During this period, Rhoades, as counsel for BAC, Braten, Soifer and other of their affiliates, instituted a series of frivolous lawsuits in New York against Bankers in order to injure Bankers and hinder and delay Bankers' collection of its debt from BAC.[4]

Starting in July 1977, BAC and its affiliates commenced further actions against Bankers, this time in South Carolina, based on claims similar to those made in the New York actions and again seeking hundreds of million of dollars in damages. Rhoades was counsel to one of the South Carolina law firms representing BAC and its affiliates.[5] At the same time, another action was pending in South Carolina state court wherein Braten, represented by the same law firm, asserted claims to funds in an escrow account derived from the sale of machinery in which Bankers had a security interest.

In late 1978 and early 1979, both of these cases were pending before state court Judge William H. Ballenger. Rhoades, using a South Carolina corporation formed by him and beneficially

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3 All of the foregoing facts, and other details of defendants' 1974–1977 bankruptcy frauds, were adjudicated, and are described in detail, in *In re Braten Apparel Corporation*, 21 B.R. 239 (Bankr. S.D.N.Y. 1982), *aff'd*, 26 B.R. 1009 (S.D.N.Y.), *aff'd*, 742 F.2d 1435 (2d Cir. 1983).

4 Those actions, which alleged that Bankers had breached an agreement to extend additional credit to BAC and sought millions of dollars in damages, were summarily dismissed. Some of these actions, before their dismissal, were discussed in *Bankers Trust Company v. Braten, et al.*, 101 Misc.2d 227, 420 N.Y.S.2d 584 (Sup. Ct. N.Y. Co. 1979).

5 The first South Carolina action was brought by BAC (a New York Corporation) together with other non-New York corporations controlled by Rhoades for the benefit of Braten and Soifer. After Bankers removed that action to federal court, BAC discontinued it. Then, substantially the same action was brought in South Carolina state court by BAC alone, so that Bankers could not remove it to federal court.

owned by Braten and Soifer, and intending to influence Judge Ballenger, acquired a mortgage owing to a local bank by a corporation of which Judge Ballenger was a principal, and on which Judge Ballenger was personally liable to the extent of $100,000. Judge Ballenger was thereby induced to render decisions favorable to BAC and Braten, as follows: namely (1) in the escrow action, Judge Ballenger appointed a "special referee" who was a former partner of the South Carolina lawyer to whose firm Rhoades was counsel; and (2) Judge Ballenger denied Bankers' motion to dismiss BAC's multi-million dollar damage action. Bankers expended over $100,000 in legal fees in those cases. After the transactions involving Judge Ballenger, Petitioners and their entities came to light, Judge Ballenger recused himself from the escrow action, citing a "possible conflict of interest," the "special referee" resigned, and Judge Ballenger's denial of Bankers' motion to dismiss the damage action was reversed by the South Carolina Supreme Court as an abuse of discretion.[6]

3. The Subsequent Bankruptcy Frauds

In its June 25, 1982 decision revoking BAC's fraudulently procured confirmation, the Bankruptcy Court stated that BAC should offer to its creditors a new and "realistic" plan "in light of the fact that the debtor owns a valuable asset—Brookfield." *In re Braten Apparel Corp.*, 21 B.R. at 263. The Bankruptcy Court, however, had been deceived by Petitioners again. After the revocation trial had concluded, but before the decision was rendered, Petitioners had embarked on a new fraudulent scheme, designed once again to subvert the bankruptcy laws, shield BAC's assets from Bankers, and frustrate the coming adverse finding by the Bankruptcy Court.

In January 1982, one of the corporations controlled by the Petitioners obtained almost $9 million from KB Business Credit, Inc. ("KBBC"), and disbursed these funds to several

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6 *See Bankers Trust v. Rhoades*, 859 F.2d at 1099; App. 5a-6a; *Bankers Trust v. Feldesman*, 648 F. Supp. 17, 22-23 (S.D.N.Y. 1987); App. 45a-46a.

other corporations controlled by Petitioners.[7] When KBBC was not repaid, it sued Braten, Rhoades and several of their corporations. Braten and Rhoades settled the lawsuit (and avoided personal liability) by having BAC, for little or no consideration, convey the stock of Brookfield Clothes to another of Petitioners' corporations, which then pledged the stock to KBBC.

At or about that time, Brookfield Clothes itself was stripped and its assets disbursed to the Petitioners. Brookfield Clothes had been phenomenally successful, had paid out millions of dollars to the other Petitioners, and still had a substantial equity in early 1982. However, shortly after the Bankruptcy Court rendered its revocation decision in June 1982, Brookfield Clothes was found to be insolvent.[8] Petitioners had taken no chances that BAC's creditors would be able to reach Brookfield Clothes or its assets; they conveyed away Brookfield Clothes and stripped it of its assets. They also further stripped BAC of other assets it had.[9]

Bankers commenced this RICO action in August 1982, just shortly after discovering this latest in the pattern of Petitioners' predicate acts of racketeering.

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7 In addition, KBBC had advanced $100,000,000 to Braten, by wiring the money to a South Carolina bank account in the name of "Braxton Ltd.", an apparently nonexistent corporation.

8 On September 1, 1982, Brookfield Clothes consented to a petition for relief under Chapter 11 of the Bankruptcy Code. 82 B. 11741 (Bktcy. S.D.N.Y.). Papers later filed in that proceeding indicated that some of Brookfield Clothes' assets had recently been sold to a partnership, one of whose members was the president of KBBC when it advanced millions of dollars to BAC's affiliates.

9 *See Bankers Trust v. Rhoades*, 859 F.2d at 1099; App. 6a; *Bankers Trust v. Feldesman*, 648 F. Supp. at 22; App. 45a. Millions of dollars apparently went to a real estate limited partnership of which Soifer and Braten are members. BAC now claims that its principal "creditor" is Rhoades, who claims to be owed $3.1 million for legal fees.

SUMMARY OF ARGUMENT

To the extent Petitioners seek review of the Second Circuit's conclusion that Bankers has standing to assert its claim for damages caused by Petitioners' bankruptcy frauds,[10] their Petitions are moot. The Second Circuit held that Bankers' "loss of legitimate debt" claim was premature and affirmed dismissal (without prejudice) of that part of Bankers' complaint.

In any event, the Second Circuit correctly found that Bankers was injured in its business or property by Petitioners' bankruptcy frauds and therefore had standing to sue. It would be contrary to the purpose of RICO to hold that a corporation that was the tool of and is still controlled by the individual racketeers is the only party that has standing to assert a claim based on Bankers' injury. No reported case has so held, and there is no conflict requiring resolution by this Court.

The Second Circuit also correctly held that Bankers' claim is not time-barred. Petitioners argue that the Second Circuit's accrual rule differs from that of the Third Circuit, but under either rule Bankers' claim was timely. Resolution of any conflict would therefore serve no purpose here.

Moreover, there is no conflict concerning petitioners' real grievance, namely, the Second Circuit's application of the "speculative damages" rule of *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971). The Second Circuit correctly followed *Zenith* in holding that the injury Bankers suffered, if any, cannot be determined until after the bankruptcy proceedings are over, and that Bankers' "loss of legitimate debt" claim has therefore not yet accrued.

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10 As used herein, "bankruptcy frauds" refers to the RICO predicate acts of "fraud in connection with a case under title 11." 18 U.S.C. § 1961(1)(D); App. 77a.

REASONS FOR DENYING THE WRIT

I.

THE SECOND CIRCUIT'S DECISION THAT BANKERS HAS STANDING TO ASSERT ITS RICO CLAIMS DOES NOT WARRANT REVIEW BY THIS COURT

A. The Second Circuit's Decision Is Consistent With This Court's Precedent

Rather than being a deviant ruling requiring this Court's review, the Second Circuit's decision that Bankers has standing is plainly consistent with this Court's existing precedents.

In *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), this Court warned against creating standing requirements not expressly included in the RICO statute:

> "[T]he plaintiff . . . has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation. . . .
>
> *But the statute requires no more than this.* . . ." [Emphasis added]

Id. at 496-97. The Court repeated this warning when it commented that early RICO-like bills offered to amend the Sherman Act had failed in Congress because they would have hampered plaintiffs with "strict requirements on questions such as 'standing to sue.' " *Id.* at 498.[11]

The Second Circuit's decision follows the Supreme Court's directive in *Sedima*. 859 F.2d at 1101; App. 10-11a. The Second

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11 *International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149 (4th Cir. 1987) (Soifer Petition, p. 5 n.3), is not to the contrary. There, the Court held that Congress intended, by narrowly describing as a predicate offense "fraud in the sale of securities", to incorporate into RICO claims based on Rule 10b-5 violations the standing requirements applied to such violations. But the Fourth Circuit distinguished RICO cases involving predicate acts of bankruptcy fraud (such as the case at bar), noting that, "In contrast, Congress did use the broader language 'any offense involving fraud connected with a case under title 11 [bankruptcy]' in the same part of the RICO statute." *Id.* at 152.

Circuit's decision is also consistent with *Haroco v. American Bank & Trust Co. of Chicago*, 747 F.2d 384 (7th Cir.), *aff'd per curiam*, 473 U.S. 606 (1985). In *Haroco*, the RICO claim was based solely upon predicate acts of mail fraud, for which there is no private right of action. Nevertheless, *Haroco* upheld plaintiff's right to sue under RICO for the damages caused by the mail fraud, because the RICO statute expressly creates a remedy for a RICO violation, even if it is based exclusively on a pattern of mail frauds.

Here, too, regardless of whether or not Bankers would have had standing, absent RICO, to sue for damages caused by the underlying bankruptcy frauds, Bankers has standing to sue for recovery of its damages caused by Petitioners' violations of RICO, even where such violation is predicated in part upon a pattern of "fraud connected with a case under title 11 [bankruptcy]." 18 U.S.C. § 1961(1)(D); App. 77a.[12]

B. There is No Conflict Among The Circuits On The Question Presented

Contrary to Petitioners' argument, no Court of Appeals has held that a creditor of a bankrupt corporation, who is injured by RICO violations comprised of a pattern including bankruptcy frauds, lacks standing under RICO to sue the wrongdoers who are still in control of the bankrupt corporation. Since there is no disagreement among the Circuits as to the issue presented, and since the Second Circuit's decision was correct, there is no reason for this Court to issue a writ of certiorari.

Petitioners rely on inapposite authority in arguing otherwise. First, Petitioners refer (Soifer Petition, pp. 5-7) to shareholder and union member suits which hold that shareholders cannot

12 "Bankruptcy fraud" is not, *per se* the gravamen of Bankers' "loss of legitimate debt" claim. Rather, it merely helps define the racketeering activity that is proscribed by RICO and that caused Bankers' injury. *Cf. Morley v. Cohen*, 610 F. Supp. 798, 808 (D. Md. 1985), *quoting United States v. Forsyth*, 560 F.2d 1127, 1135 and n.11 (3d Cir. 1977) [citations omitted] ("RICO . . . was designed to punish the impact on commerce caused by conduct which meets the statute's definition of racketeering activity").

sue individually to recover for injuries suffered by their corporations, and union members cannot sue individually for injuries suffered by their unions.[13] But, as the Second Circuit correctly noted (859 F.2d at 1101; App. 10a), Bankers is a *creditor* of BAC, not its shareholder or otherwise in control of BAC. Thus, the corporate law doctrine of shareholder derivative (and union member) suits does not apply, and shareholder derivative cases are not applicable.[14]

Petitioners next refer (Soifer Petition, pp. 7-10) to cases holding that creditors may not bring their own actions during the pendency of the debtor's bankruptcy proceeding. However, none of these cases is a RICO case. None of these cases considered the policies and purposes of RICO (*see* Point I(C) *infra*), and none of them dealt with the issue decided by the Second Circuit below.[15]

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13 The union member cases were decided by analogy to shareholder derivative principles.

14 The shareholder derivative cases recognize that, in such cases, the injury to be redressed is to the corporation; the shareholder's injury is merely derivative (*i.e.*, the value of the shareholder's shares is diminished). Here, by contrast, the Second Circuit correctly recognized that Bankers is suing for its own direct injury. 859 F.2d at 1101; App. 10a.

15 Those cases are distinguishable in other respects as well. For example, in *Koch Refining v. Farmers Union Central Exchange, Inc.*, 831 F.2d 1339 (7th Cir. 1987), plaintiff's complaint sought almost precisely the same relief as was sought by the bankruptcy trustee (*id.* at 1341). Here, Bankers' claim is not similar to any outstanding claim by BAC or its (*non-existent*) trustee; indeed, no one else has asserted a claim like Bankers' against these defendants. *In re S. I. Acquisition, Inc.*, 817 F.2d 1142 (5th Cir. 1987), and *In re Mortgage America*, 714 F.2d 1266 (5th Cir. 1983), both involved violations of state laws designed to protect the debtors—not violations of RICO in which the debtor participated and which were designed to subvert the bankruptcy process, as is the case here. *In Mitchell Excavators, Inc. v. Mitchell*, 734 F.2d 129 (2d Cir. 1984), the plaintiff *expressly* brought the case in the name of the *debtor* and to vindicate the *debtor's* rights, in his capacity as a shareholder. Here, Banker has not attempted to assert BAC's rights, but its own. And in *Gochenour v. Cleveland Terminals Building Co.*, 118 F.2d 89 (6th Cir. 1941), the creditors of a bankrupt company were essentially trying to structure a reorganization through litigation, which plainly runs afoul of the Bankruptcy Court's jurisdiction—and which, just as plainly, Bankers here is not trying to do.

Finally, Petitioners argue (Soifer Petition, pp. 10-12) that the Fifth and Seventh Circuits would bar Bankers' claim, and so are in conflict with the Second Circuit. Petitioners are incorrect.

First, the Seventh Circuit is not in conflict with the Second Circuit. To the contrary, in *Sutliff, Inc. v. Donovan Companies, Inc.*, 727 F.2d 648 (7th Cir. 1984), a bankrupt company and two of its creditors sued the persons who bankrupted the company and made the creditors unable to recover on the credit they extended. In upholding the individual creditors' right to sue under RICO in their own behalf, the Seventh Circuit declared

> "If as we believe the complaint adequately alleges a 'pattern of racketeering activity' . . . directed against Sutliff, Inc. [the bankrupt] *it does so even more clearly with respect to the other plaintiffs* [the individual creditors]."

Id. at 653 [emphasis added].

Petitioners ignore *Sutliff*. They rely instead on *Carter v. Berger*, 777 F.2d 1173 (7th Cir. 1985) and several district court cases. In *Carter*, taxpayers sued under RICO, claiming that defendants had corruptly obtained lowered property assessments for tax purposes, thereby causing plaintiffs' taxes to rise. The Seventh Circuit dismissed on standing grounds, based on the antitrust "passing on" doctrine of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).[16] Nevertheless, the Seventh Circuit pointed out that if the county were under the control of the wrongdoers, the taxpayers *would* have standing:

> "Doubtless indirectly injured parties could come under RICO when they show that the directly injured party was under the continuing control or influence of the defendant or his henchman."

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16 This borrowing of antitrust standing principles may have been error. *See Sedima, supra*, 473 U.S. at 498-99 ("In borrowing its 'racketeering injury' requirement from antitrust standing principles, the court below created exactly the problems Congress sought to avoid").

777 F.2d at 1178. Here, where there is no trustee and defendants still control BAC, *Carter* supports the result below. Similarly, in *Dana Molded Products, Inc. v. Brodner*, 58 B.R. 576 (N.D. Ill. 1986) (Soifer Petition, p. 12 n.12), although the district court dismissed a RICO claim brought by a creditor against corporate insiders who looted corporate assets, the Court expressly stated that this holding would *not* apply "where the RICO victim is a wrongdoer as well" (*id.* at 580, citing *Carter*, 777 F.2d at 1176). Significantly, in *Dana Molded*,—and *unlike* the case here—there already was a trustee in charge who was not claimed to be under defendants' control.

Equally important, one reason stated for the Seventh Circuit's decision in *Carter v. Berger* was to "concentrate the right of recovery" so as "to promote the goal of deterrence." 777 F.2d at 1176. Here, the rule urged by Petitioners would have the exact *opposite* effect. In view of the facts here—including defendants' mockery of the legitimate bankruptcy process—it is clear that *no* "deterrence" would be afforded if BAC, the tool of their RICO enterprise, were made the sole party with standing to assert Bankers' RICO claims.

The two additional district court cases cited by Petitioners (Soifer Petition, pp. 9, 10) are not to the contrary. Thus, in *Barnett v. Stern*, No. 85 C 144, 1988 U.S. Dist. LEXIS 13445 (N.D. Ill., Nov. 30, 1988), as in *Dana Molded*, there already was an independent trustee; while in *Mitsubishi Electric Sales America, Inc. v. Higgins*, No. 88 C 3772, 1988 U.S. Dist. LEXIS 12898 (N.D. Ill. Nov. 10, 1988), there was no allegation that the bankrupt company was still controlled by the defendant racketeers.[17]

Here, BAC is conceded to be under the continuing control of the defendants. *Bankers Trust Co. v. Feldesman*, 676 F. Supp. 495, 503 (S.D.N.Y. 1987); App. 36a. Thus, the decision of the

17 In any event, these district court cases do not give rise to a conflict among the Circuits. To the extent these cases do not follow the Seventh Circuit's decision in *Sutliff v. Donovan*, *supra*, there is an intra-Circuit conflict that should be left to the Seventh Circuit to resolve.

Second Circuit below is consistent with those in the Seventh Circuit.[18]

National Enterprises, Inc. v. Mellon Financial Services Corp. No. 7, 847 F.2d 251 (5th Cir. 1988) (Soifer Petition, pp. 10-11), is even more inapposite to the case at bar. In *National Enterprises*, there was no bankruptcy fraud, no deliberate bankrupting of a business to defraud creditors, and no breakdown or subversion of the bankruptcy process to defeat creditors' claims, or an attempt to specifically victimize the plaintiff—all of which are present here. Instead, there was only an alleged kickback scheme that reduced the company's assets. Also unlike the case at bar, the malefactors there were not in control of the company—its trustee in bankruptcy was pursuing a RICO claim based on exactly the same allegations as the plaintiff. *Id.* at 252 n.1. Thus, there is no significant inconsistency between the *National Enterprise* decision and the decision of the Court below requiring resolution by this Court.

Despite their concession that BAC is still in Petitioner's control and despite the language of *Carter* and *Dana Molded*, *supra*, Petitioners argue (Soifer Petition, p. 10 n.7) that Bankers lacks standing. To defuse the issue of their own control of BAC, defendants speculate that Bankers could have a trustee in bankruptcy appointed (supplanting their control of BAC), and then try either to persuade the trustee to bring this case on behalf of BAC or to obtain a ruling that the claim was abandoned so that Bankers could start this case up again.

In the 15-year history of the BAC (and now Brookfield) bankruptcies, defendants have held Bankers at bay by adroit manipulation of bankruptcy court procedure. The trustee maneuver that they now present is of a piece with their previous

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18 *See also*, *Cenco v. Seidman & Seidman*, 686 F.2d 449, 454-55 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982) (the fact that some of the individual wrongdoers could benefit from a recovery on a RICO claim brought by or on behalf of BAC—defendants Braten and Soifer are the shareholders of BAC and BAC also asserts that defendant Rhoades has a $3.1 million "claim" against it—would render such a recovery "perverse from the standpoint of compensating the victims of wrongdoing").

devices. It would gut the remedial purpose of RICO to send Bankers, the injured party, back for another futile lap around the bankruptcy court—which Petitioners have already defrauded.

Furthermore, the creditors of the estate other than Bankers are all well aware of the 1974–1976 and 1982 bankruptcy frauds alleged herein. Bankers' RICO claim has been the subject of five reported judicial decisions. Yet no creditor has shown any interest in having the estate pursue this case. After years of inaction, there is no reason to think that a trustee supported by BAC's creditors would prosecute this case. Moreover, even if BAC's hypothetical future trustee could or would state a claim, he might yet be barred from doing so by the statute of limitations.[19]

In addition, Petitioners' argument leads to the anomalous result that even BAC's theoretical trustee-to-be would not have full power to pursue BAC's injury. The alleged RICO pattern would include the stripping of the assets of Brookfield Clothes, itself now in bankruptcy. Under Petitioner's argument, only *Brookfield's* bankruptcy trustee would have standing to sue for recovery of Brookfield's assets. (Brookfield's trustee has shown no desire to do so.) Bankers' claims would thus be swallowed up in a labyrinth of bankruptcies created by defendants—*precisely the result that RICO was enacted to avoid* (*see* Point I(C), *infra*).

Petitioners' argument would thus produce the untenable result that there is a clear violation, a clear injury, clear causation, and yet there is no one who will be able to secure a remedy

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19 Defendants would no doubt assert that any claim now brought by a trustee for events that took place in 1982 and earlier are time-barred. *See Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143 (1987) (four-year limitation period applies). *Compare* 11 U.S.C. § 29e (1898 Bankruptcy Act § 11e) (trustee has *two* years from date of adjudication to bring action in behalf of estate); 11 U.S.C. § 742 (Act § 342) (debtor in possession has "all the powers of a trustee"); and 11 U.S.C. § 778(a)(2) (Act § 378(a)(2)) (apparently indicating that filing of petition, under § 322, Chapter XI, is to be treated as a decree of adjudication).

for Bankers' very real injury. There is nothing in RICO, in the 1898 Bankruptcy Act, or in any case, that warrants such a bizarre outcome—which the Second Circuit correctly avoided.

C. There Is No Conflict Here Between RICO And The Bankruptcy Laws Requiring Resolution By This Court

RICO provides (18 U.S.C. § 1961(1)(D)) that "any offense involving fraud connected with a case under title 11 [the bankruptcy statute]" is a predicate act which can be part of the pattern giving rise to liability. Congress clearly anticipated that RICO claims would be brought to redress injuries caused by a pattern including bankruptcy frauds. Furthermore, as the Second Circuit has noted elsewhere, the mere fact that certain of the facts pleaded by Bankers could also support a claim by the debtor or its trustee, does not deprive Bankers of standing to assert its own claims. *Cumberland Oil Corp. v. Thropp*, 791 F.2d 1037, 1042 (2d Cir.), *cert. denied*, 479 U.S. 950 (1986).[20]

Obviously, Congress enacted RICO with full awareness of the 1898 Bankruptcy Act (under which BAC filed its Chapter XI petition). Yet Congress did not limit standing to sue for RICO claims based on "fraud connected with a case under Title 11" to the bankrupt or its trustee. Rather, RICO's remedy was granted to "*any* person injured" by the RICO violation (18 U.S.C. § 1964(c); App. 87a [emphasis added])—and Congress further admonished that "RICO is to be read broadly." *Sedima*, 473 U.S. at 497.[21]

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20 Petitioners' attempt (Soifer Petition, p. 10) to distinguish *Cumberland Oil* misses the point. In *Cumberland Oil*, no less so than here (and perhaps more so), the *injury* was caused by the *same* removal of assets that presumably injured all of the bankrupts' creditors; yet plaintiff's individual claim was allowed to proceed.

21 Eight years after RICO was enacted, the bankruptcy laws were recodified by the Bankruptcy Reform Act of 1978 (which, however, does not govern BAC's bankruptcy; *see* P.L. 95-598 § 403(a), 92 Stat. 2549, making the Bankruptcy Code inapplicable to pre-Code cases.) The new Bankruptcy Code provides no standing limitation on RICO claims brought by persons injured by bankruptcy frauds.

Indeed, Congress' concern with the injury caused to creditors by bankruptcy fraud was a major reason it enacted RICO. *See* Criminal Laws and Procedures, Hearing on S. 2187, 2188, 2189, 2190 and 2578 before the Subcommittee on the Judiciary, 89th Cong. 2d Sess. 204 (1966):

> ". . . [D]eliberate bankruptcy is an alarming new nationwide phenomenon. Crime syndicates install ostensibly honest front men in business . . . , then loot and legally bankrupt the firm . . . But since these manipulations are almost impossible to prove, creditors are left holding the bag. . . .
>
> . . . It is estimated that lone operators copying Mafia techniques, bankrupt at least a thousand smaller businesses each year."

By creating a private right of action for persons injured by a RICO violation, Congress granted individual creditors standing to sue under RICO for the subversion and misuse of the bankruptcy laws like that alleged in this case.

Petitioners here are accused of precisely the "bust-out" bankrupting of a business (here, BAC and Brookfield), which so concerned Congress. Particularly here, where repeated bankruptcy frauds have made a mockery of Bankers' conventional bankruptcy remedies, the Congressional intent behind RICO can only be vindicated by according Bankers standing. To give the bankrupted tool of the racketeering enterprise—which here is still controlled by the racketeers—sole standing to act would defeat the clear Congressional intent behind RICO.

The Second Circuit gave proper weight both to the bankruptcy law and to RICO. The Second Circuit found that Bankers would have standing to sue under RICO for its "loss of legitimate debt" injury—while delaying Bankers' right to pursue that claim until Bankers' injury could be ascertained as a result of the bankruptcy proceedings—thereby avoiding even a potential conflict with bankruptcy law policies.

There is no conflict between RICO and the bankruptcy law under the facts of this case. In the more-than six (6) years that

this action has been pending, no effort has been made by the Bankruptcy Court or any creditor of BAC to stay this action or have BAC take it over—only the defendants (Petitioners) here want that to happen. *Cf. Teledyne Industries v. Eon Corp.*, 401 F. Supp. 729, 734 (S.D.N.Y.), *aff'd on opinion below*, 546 F.2d 495 (2d Cir. 1976) (court noting, in allowing individual creditor's suit to proceed against bankrupt's officers, that bankruptcy judge had refused to enjoin said action). No effort has been made by any creditor to appoint a trustee or to pursue the claims raised by Bankers. Indeed, there has simply been no interest on the part of *anyone*, other than Bankers, to pursue this claim since commission of the first frauds in 1974–1976.

For these reasons, nothing in either RICO or the Bankruptcy Act deprives Bankers of its right to sue for its injuries caused by Petitioner's violations of RICO. The supposed need to protect BAC's bankruptcy proceeding from Bankers' RICO action is an illusion concocted by the three Petitioner-defendants, who are still in control of BAC, for the obvious purpose of preventing Bankers from recovering its due.

II.

REVIEW IS NOT WARRANTED HERE, SINCE BANKERS' CLAIMS ARE TIMELY UNDER EITHER OF THE ALLEGEDLY CONFLICTING APPROACHES

A. Bankers' Claims Are Timely Under Either Accrual Rule

Petitioners' argument (Soifer Petition, Point II(A),(B)), that there is a conflict between the Second and Third Circuits, even if correct, is academic here; resolution of that conflict cannot benefit Petitioners.

As the Petitioners concede (Soifer Petition, Point II(A),(B)), the rule of accrual adopted by the Third Circuit in *Keystone Insurance Co. v. Houghton*, 863 F.2d 1125 (3d Cir. 1988), is more open-ended than the rule adopted by the Second Circuit below. Under the Third Circuit's rule, none of the claims here would be time-barred, since at least some predicate acts (the

1982 bankruptcy frauds) were committed within four years of the commencement of this suit.[22]

Petitioners further assert (Soifer Petition, p. 21) that ". . . the Second Circuit's rule of separate accrual appears far more consistent with the principles of *Wilson v. Garcia* [471 U.S. 261 (1985)] than [does] *Keystone*." *Accord*, *Statefarm Mutual Automobile Insur. Co. v. Ammann*, 828 F.2d 4, 5 (9th Cir. 1987). Obviously, then, Petitioners are not aggrieved by the Second Circuit's rule. If any party here should wish to urge that the Third Circuit's rule should be adopted, it would be Bankers.

B. Review Is Not Warranted Here, Where The Second Circuit Properly Applied The Rule in *Zenith v. Hazeltine* And There Is No Conflict Between The Circuits

What petitioners actually complain of is the Second Circuit's application of the speculative damages rule of *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), to the accrual of Bankers' claim to recover damages for loss of its debt. Petitioners do not point to any Circuit Court reaching a contrary conclusion, and Bankers is unaware of any. Consequently, there is no conflict among the Circuits requiring resolution by this Court.

Furthermore, the Second Circuit's application of the speculative damages rule was unexceptional, and certainly consistent with well-established principles. The Second Circuit concluded, quite simply, that if Bankers were ultimately to recover its legitimate debt in the bankruptcy proceeding, it would have no recoverable injury—or, to put it more broadly, Bankers' right to sue for loss of debt should await a resolution of the existence

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22 Contrary to Petitioners' statement (Soifer Petition, p. 21; *cf.* 863 F.2d at 1129 n.5), the Third Circuit's accrual standard is clearly different from the one adopted by the District Court below: The District Court below held that the claim accrued when Bankers learned of the last predicate act *causing injury* (648 F. Supp. at 36; App. 72a); the Third Circuit held that the claim accrued when plaintiff learned of the last predicate act in the pattern—but "the last predicate act *need not have caused injury* to the plaintiff." 863 F.2d at 1130 [emphasis added].

and amount of such damages. Thus, the Second Circuit merely recognized the impossibility of determining what, if any, loss of legitimate debt injury Bankers suffered by reason of the bankruptcy frauds, until the termination of the bankruptcy proceedings. 859 F.2d at 1105-06; App. 21a-22a.[23]

Petitioners cannot persuasively argue that the *Hazeltine* speculative damages rule, originally applied in antitrust cases, has no application to RICO cases. This Court has found the analogy between RICO and the Clayton Act to be compelling. *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 107 S. Ct. 2759, 2764-67 (1987). As the Second Circuit noted,

> "we have little trouble in concluding that the same statute which lends its four-year limitation period to civil RICO actions should also lend its rule of accrual in determining when the four year period begins to run."

859 F.2d at 1104; App. 17a. And just as *Hazeltine*'s speculative damages rule is necessitated in part by "the strong congressional policy in favor of antitrust enforcement by private damage suits," *Fitzgerald v. Seamans*, 553 F.2d 220, 227 (D.C. Cir. 1977) (Soifer Petition, p. 26), so the Congressional policy in favor of RICO enforcement by private damage suits is equally strong here. *See* 18 U.S.C. § 1964(c) (App. 87a-88a); *Malley-Duff*, *supra*, 107 S. Ct. at 2764-65, where this Court pointed out, *inter alia*, that

> "Both RICO and the Clayton act are designed to remedy economic injury by providing for the recovery of treble damages, costs, and attorney's fees. Both statutes bring to bear the pressure of 'private attorneys general' on a seri-

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23 Of course, if the Second Circuit erred in applying the *Hazeltine* rule, then Bankers should be free to sue now for its "loss of legitimate debt" claim, since Bankers has standing to recover for its injury (Point 1, *supra*), and any feared disruption of the bankruptcy proceedings is (a) purely speculative, (b) capable of being controlled by the bankruptcy and district courts if they deem it necessary, and (c) extremely unlikely anyway in view of the demonstrated indifference of the bankruptcy court and BAC's other creditors to Bankers' RICO claims herein.

> ous national problem for which public prosecutorial resources are deemed inadequate; the mechanism chosen to reach the objective in both the Clayton act and RICO is the carrot of treble damages. Moreover, both statutes aim to compensate the same type of injury; each requires that a plaintiff show injury 'in his business or property by reason of' a violation".

In an attempt to avoid the *Hazeltine* speculative damages rule, Petitioners mischaracterize Bankers' claim. They argue (Soifer Petition, p. 28) that Bankers' "loss of legitimate debt" claim accrued in 1976, when Bankers' discovered Petitioners' *first* set of bankruptcy frauds. Petitioner's argument is wrong.

First, as recognized by the Second Circuit (859 F.2d at 1105-06; App. 21a), Bankers suffered a separate and distinct injury from Petitioners' second series of frauds in 1982. Those frauds deprived Bankers of such return as would have been available in 1982 had BAC not been illegally stripped of its assets, and also had the effect of depriving Bankers of its conventional bankruptcy law remedies. Because Bankers succeeded in proving Petitioners' initial (1974-74) bankruptcy frauds, the Bankruptcy Court revoked its 1976 confirmation of BAC's fraudulently procured arrangement. This revocation restored BAC's bankruptcy so that, had BAC and Brookfield Clothes not been stripped by Petitioner's subsequent frauds, Bankers would have been able to recover its debt.

Thus, there was a new injury, and a new claim accrued, in 1982.

Furthermore, Bankers could also still sue for Petitioners' 1978 bribery and 1982 bankruptcy frauds: At no time did Petitioners gain a prescriptive license to continue to violate RICO by reason of their prior misconduct. Under *no* circumstances, then, could Bankers' RICO claim be time-barred.

CONCLUSION

The separate Petitions of Herman Soifer, and of Daniel Rhoades and Milton Braten, for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, should be denied.

Dated: March 10, 1989
New York, New York

Respectfully submitted,

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